127-409

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 272.

JOB BARNARD, ADMINISTRATOR OF ROBERT H. RYAN, DECEASED, APPELLANT,

vs.

THE DISTRICT OF COLUMBIA.

APPEAL FROM THE COURT OF CLAIMS.

FILED AUGUST 17, 1885.

Any other construction than the one here contended for would destroy the whole system, so admirably framed and long established, to promote the prompt and regular transportation of the mails.

Respectfully submitted.

A. H. GARLAND,
Attorney-General.
ROBERT A. HOWARD,
Assistant Attorney-General.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, SEPTEMBER 21, 1887.

1 I.—*Petition. Filed November* 11, 1880.

In the Court of Claims.

ROBERT H. RYAN
vs.
THE DISTRICT OF COLUMBIA, } No. 127.

Robert H. Ryan, the petitioner, herein states to the Court as follows:

First. He is a citizen of the United States, and resides in the District of Columbia.

Second. The said defendant, the District of Columbia, is a body corporate under the statutes of the United States, and as such, has all the powers and is charged with all the duties which formerly belonged to the Board of Public Works of said District.

Third. On the 23d day of July, 1872, this petitioner entered into a contract with the late Board of Public Works of said District for the improvement of New Jersey avenue, from B street south to the Potomac river, in Washington city, which contract was in writing and was numbered 414. That the said contract was renewed or extended under the same number by the Commissioners of the defendant, after the act of Congress of June 20th, 1874, and the petitioner performed a greal deal of work thereunder, after that date, for the defendant. That the said contract and the so-called extension are now in the custody of the officers of the defendant, and for that reason the petitioner cannot file copies thereof herewith; but if deemed material by the Court when said contracts are produced, he asks that copies thereof may be incorporated in this petition.

2

Fourth. That the petitioner performed the said agreement and the so-called extension thereof, fully, upon his part, so far as he was permitted to do by the said Board of Public Works and the said defendant, and received for the material furnished and the work performed thereunder and in connection therewith, cash and certificates of the auditor of the said Board of Public Works and of the late Board of Audit of the District of Columbia in payment therefor. That he also earned under the said contract and the so-called extension thereof, the sum of $\$166\frac{28}{100}$ which was not paid to him either in cash or certificates, and the same is detained by the defendant from him without right, although the same was reported to be due him by the officers in charge of the measurement of the said work so done by him.

Fifth. That neither the said contract nor the extension thereof, provided the rate of compensation which the petitioner should receive for the excavation of stone or rock, in the progress of grading on said work, but it was understood and agreed between the petitioner and said Board of Public Words, that in the absence of any stipulation in the said agreement for work or materials done or furnished by the petitioner in the progress of the work agreed to be

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2 performed a greal deal of work thereunder, after that date, for the defendant. That the said contract and the so-called extension are now in the custody of the officers of the defendant, and for that reason the petitioner cannot file copies thereof herewith; but if deemed material by the Court when said contracts are produced, he asks that copies thereof may be incorporated in this petition.

Fourth. That the petitioner performed the said agreement and the so-called extension thereof, fully, upon his part, so far as he was permitted to do by the said Board of Public Works and the said defendant, and received for the material furnished and the work performed thereunder and in connection therewith, cash and certificates of the auditor of the said Board of Public Works and of the late Board of Audit of the District of Columbia in payment therefor. That he also earned under the said contract and the so-called extension thereof, the sum of $\$166\frac{28}{100}$ which was not paid to him either in cash or certificates, and the same is detained by the defendant from him without right, although the same was reported to be due him by the officers in charge of the measurement of the said work so done by him.

Fifth. That neither the said contract nor the extension thereof, provided the rate of compensation which the petitioner should receive for the excavation of stone or rock, in the progress of grading on said work, but it was understood and agreed between the petitioner and said Board of Public Words, that in the absence of any stipulation in the said agreement for work or materials done or furnished by the petitioner in the progress of the work agreed to be

performed, that the regular rates established by the said Board of Public Works should govern. That under that understanding and agreement, the petitioner did certain grading or excavation of stone or rock in the said work on said avenue, prior to the 25th day of September, 1873, amounting to 5,800 cubic yards, for which he was entitled, according to the said rates established by the said
3 Board, to the sum of ($1.00) one dollar per cubic yard. That he only received the sum of 30 cents per cubic yard therefor.

Sixth. That he presented his claim for the balance thereof of 70 cents per cubic yard for said work, to the late Board of Audit of said District, and the said Board investigated the same and allowed it, and the certificate for the difference in the said price, amounting to $4,060.00, was filled out ready for signing just before the said Board of Audit was abolished by the act of Congress of March 14th, 1876, and on that account and no other the petitioner was deprived of receiving the certificate of said Board of Audit for the said sum of $4,060.00, so earned; and he has not received either in cash, or certificates, or otherwise, anything whatever on account of the said sum, and the same is now due to him from the defendant.

He therefore claims that there is due him from defendant, by reason of the facts above set forth, the sum of $4,226.28, with interest on the said sum of $4,060.00 from September 25th, 1873, and interest on the said $166.28 from the 28th of January, 1876, until paid, exclusive of all set-offs and just grounds of defense, and he asks judgment therefor.

ROBERT H. RYAN.

JOB BARNARD,
Attorney for Claimant.

DISTRICT OF COLUMBIA, *ss:*

I, Robert H. Ryan, being duly sworn, do depose and say that I am the claimant named in the foregoing petition and that no assignment or transfer of said claim or of any interest therein has been made by me which is now outstanding and uncancelled; that I am justly entitled to the amount therein claimed from the District of Columbia, after allowing all just credits and off-sets, and I believe the facts as stated in the foregoing petition are true.

ROBERT H. RYAN.

Sworn to and subscribed before me this first day of November, A. D. 1880.

A. C. RICHARDS, *J. P.* [SEAL.]

Claimant's address, Washington, D.C.
Claimant's attorneys, Edwards and Barnard, 503 D St. N. W., Washington, D. C.

4 II.—*Traverse. Filed December* 10, 1880.

And now comes the Attorney General, on behalf of the District of Columbia, and answering the petition of the claimant herein, denies

each and every allegation therein contained, and asks judgment that the petition be dismissed.

THOMAS SIMONS,
Asst. Attorney General.

III.—*Death of Claimant Suggested and Suit Revived in Name of the Administrator. May* 31, 1881.

At a Court of Claims held in the city of Washington, on the 31st day of May, 1881, in the cause aforesaid.

Mr. Barnard suggested the death of the claimant and filed letters of administration of Job Barnard, and moved that the suit be revived in his name as administrator, which was allowed.

5 IV.—*Counter-claim. Filed March* 19, 1885.

And now comes the Attorney General on behalf of the District of Columbia, and for a further plea says:

That at and before the institution of this suit, the claimant was and still is indebted unto the District of Columbia in the full and just sum of six thousand dollars ($6,000) for money had and received to the use of the defendant, and the said claimant being so indebted as aforesaid, in consideration thereof promised to pay the defendant the said sum of money on request, yet the said claimant, although often requested so to do, hath not nor hath any one in his behalf, as yet paid the same sum or any part thereof, but hath wholly neglected and refused, and still neglects and refuses, so to do; which said sum, so due as aforesaid, the defendant claims to set off against the demand of the claimant, and thereupon he brings his counter-claim.

THOMAS SIMONS,
Asst. Attorney General.

6 V.—*Findings of Fact and Conclusion of Law. Filed April* 20, 1885.

This case having been heard before the Court of Claims, the court upon the evidence, finds the facts to be as follows:

I.

Robert H. Ryan entered into a contract with the Board of Public Works, July 23, 1872, for the improvement of New Jersey avenue southeast, in Washington; the parts of which, material in this case, are as follows:

First. That the said party of the second part has agreed, and by these presents doth agree, with the said party of the first part, for the consideration hereinafter mentioned and contained, and under the penalty expressed in a bond bearing even date with these presents and hereunto annexed, to furnish at his own proper cost and expense all the necessary materials and labor, and, in a good, firm, and substantial manner, to grade, set the curbstone, lay and put down the brick foot-pavements, to park, and construct the sewer

laterals along New Jersey avenue, from B street south to Potomac river, in the city of Washington, D. C.; also to construct 18-inch stone walls (which shall be laid in cement) in the two openings at the east and west ends of the culvert under New Jersey avenue, between D and E streets southeast; * * * also, to lay and put down the pavement known as and called the "Perry Wooden Block Pavement" in the carriageway of said New Jersey avenue, between B and E streets southeast. * * *

Five cents per square foot will be retained by the Board for eight months after the pavement is finished to repair any settlement or other defect which may be shown within that time; such repairs to be made by the Board as they may deem necessary. * * *

Sixth. It is further agreed that all loss or damage arising out of the nature of the work to be done under this agreement, or from any unforeseen obstruction or difficulties which may be encountered in the prosecution of the same, or from the action of the elements, or from incumbrances to individuals, property, or otherwise on the line of the work or adjacent thereto, shall be sustained by the said contractor. * * *

Eighth. And it is further agreed that partial payments shall be made by the duly authorized financial agent of said party of the first part on the monthly estimates of the chief engineer of the Board of Public Works aforesaid, and that whenever the said chief engineer aforesaid shall certify, in writing, that the party of the second part completely performed this contract on his part, and shall submit, with said certificate, his estimate of the amount due the party of the second part, then, within thirty days, as hereinafter provided, the said party of the second part shall be entitled to receive the full amount due under this contract, deducting therefrom all previous partial payments which may have been made as hereinafter mentioned.

And it is further expressly agreed that no money shall become due and payable under this contract, except upon the certificate of said engineer, as hereinbefore provided; and the said party of the second part further agrees that he shall not be entitled to demand or receive payment for any portion of the aforesaid work except in the manner set forth in this agreement; and when each and all of the stipulations hereinbefore mentioned are complied with, and the engineer shall have given his certificate to that effect, a final settlement shall be made in writing between the parties, and the whole amount found due the party of the second part under this contract shall be paid to him excepting such sum or sums as may be retained under any provision of this contract: *Provided*, That partial payments may be made under direction of the said party of the first part, otherwise than upon the estimates of the said engineer as provided above, if, in the opinion of the said party of the first part the vigorous prosecution of the work will be promoted thereby. * * *

Tenth. It is further agreed that the said party of the second
7 part shall receive the following prices as full compensation for furnishing all the materials and labor which may be re-

quired in the prosecution of the whole of the work to be done under this agreement, and in all respects completing the same, to wit:

Grading, 30 cents per cubic yard, which shall include the first 200 feet of hauling.

For every additional 200 feet of hauling, per cubic yard, 1 cent.

Setting curbstones, new, 8-inch, per linear foot, 40 cents.

Setting curbstones, new, 6-inch, per linear foot, 30 cents.

Setting curbstones, new, 5-inch, per linear foot, 25 cents.

Resetting curbstones, old, 4-inch, per linear foot, 15 cents.

Laying brick pavement, new, per square yard, 80 cents.

Relaying brick pavement, old, per square yard, 25 cents.

Provided, That bricks shall be furnished by the Board, at a price not exceeding $11.50 per 1,000.

For furnishing material and putting up stone steps, including foundation, complete, per linear foot, $3.

Six-inch sewer pipe, per linear foot, 36 cents.

Excavation and refilling, 40 cents per cubic yard, to be measured in excavating only.

Parking, furnishing and laying sod and soil, as per specifications, per square yard, 50 cents.

Stone masonry per perch, $6.50.

Fifteen-inch pipe, per linear foot, $1.33.

Twelve-inch pipe, per linear foot, 88 cents.

Perry wood pavement, treated as aforesaid, per square yard, $3.50, to include 2 feet grading, which said measurements or prices the said party of the the first part shall pay to said party of the second part, as herein provided.

Eleventh. It is further agreed that the measurements shall be made by the engineer of the said party of the first part or his assistants.

Twelfth. And the said party constituting and composing the Board of Public Works in and for the District of Columbia aforesaid agree with the said party of the second part to perform all the stipulations of this contract obligatory in it, and to pay or cause to be paid to the said party of the second part, or his heirs, executors, or administrators, in lawful money of the United States, the amount which may be found from time to time due him according to the contract.

II.

Previously to the making of said contract, to wit, June 22, 1872, the Board of Public Works had made the following order which appears of record in its journal.

Chief engineer was * * * also notified that the following price was established for rock excavation, viz:

In ditches for sewers, &c., $1.50 per cubic yard.

Cutting down streets and the like, $1 per cubic yard.

Auditor and contract clerk notified.

* * * * * * *

At some time after the making of said contract the Board adopted

a printed form of contracts, in which "Grading, for each and every cubic yard of earth, sand, or gravel excavated," and "rock excavation in cutting down streets, when blasting is required," were put down in separate items to be paid for at different prices.

In grading streets the Board in some cases did allow, on the certificate of the engineer, $1 per square yard for rock excavation, even where no blasting was required, without reference to the terms of the contracts. And taken by itself $1 a square yard was a fair and reasonable compensation for such kind of grading.

III.

In pursuance of his contract said Ryan performed a large amount of work on New Jersey avenue. Part of the grading done consisted of excavation of rocks and bowlders of different sizes, mingled with the earth, but none requiring blasting. The quantity of such excavation was reported by the Board superintendent of the work at 5,800 yards which estimate came from the engineers.

8 IV.

An account between the parties was stated and settled, as follows:

WASHINGTON, D. C., *Sept.* 25, 1873.

Board of Public Works, D. C., to Robert H. Ryan, Dr.

6,008¼	square yards new brick pavement laid, at $1 per yard	$6,008 25
2,996	running feet 6-inch new b. s. curb and setting, at $1.42 per foot	4,254 32
588	running feet 6-inch old b. s. curb and setting, cut to 5-in., 30 cents per foot	176 40
268¼	running feet 5-inch b. s. curb and setting, $1.20 per foot	321 90
1,368	running feet 4-inch b. s. curb and setting, 95 cents per foot	1,299 60
130	running feet 6-inch granite circular curb and setting, $2.05 per foot	266 50
913¼	running feet brick gutter laid flat, 1ft. wide, 10c	91 32
8,889	cubic yards grading, at 40 cents per yard	3,555 60
16,428 7/10	cubic yards grading, at 30 cents per yard	4,928 61
25,317 7/10	cubic yards haul, 800 ft. over 200 ft., at 4 cents per yard	1,012 70
8,993	square yards wood pavement laid, at $3.50 per yard	31,475 50
8,300	square yards sodding, at 50 cents per yard	4,150
722	square yards resodded because of fall of sewer banks, 50	361

394¾	lin. ft. Seneca stone steps, $3	2,684 26	
395	" " check blocks for steps, $3	1,185	
		61,770 95	
	Property	4,932 25	
		56,838 70	
	Brick	461 58	
		56,377 12	
	Certif's	50,000 56	
		6,376 56	
	Reserve [retain] on brick pav't, 8 mos	300 40	
		6,076 16	

NOTE.—$2 to be deducted from reserve [retain.]

I hereby certify that I have measured and inspected the work done by Robert H. Ryan, on the improvement of New Jersey ave. S. E., from B to E street, in sqr's ——, embraced in his bill dated Sept. 25, 1873, which work was done under the order of the Board of Public Works (contract No. 414, 1872), and find it correct as to quantity and quality, and that the work has been done and material and labor furnished as per contract and specifications.

CHAS. E. BARNEY,
Assistant Engineer.

Dated Sept. 25, 1873.

Approved Sept. 25, 1873.

ADOLF CLUSS,
Engineer B. P. W. in ch'ge.

I certify that the foregoing bill is correct in form, and that the prices are according to contract, and is therefore audited in the sum of sixty hundred and seventy-six and $\frac{16}{100}$ dollars.

J. C. LAY,
Auditor B. P. W.

Dated Oct. 13th, 1873.

Received October 13, 1873, certificates 3392, 3393, and 3394 for $6,078.16.

ROBERT H. RYAN.

This am't should be $6,078.16. Retain, 298.40.

9 V.

Subsequently, in January, 1876, after the abolition of the Board of Public Works, the Board of Audit stated the following account with said Ryan, and he was paid the balance thereof January 14, 1876:

WASHINGTON, D. C., *Sept.* 25, 1873.

Board of Public Works, D. C., to Robert H. Ryan, Dr.

6,008¼	square yards new brick pavement laid, at $1 per yard	$6,008 25
2,996	running feet 6-inch new b. s. curb and setting, at $1.42 per foot	4,254 32
588	running feet 6-inch old b. s. curb and setting, cut to 5-in., 30 cents per foot	176 40
268¼	running feet 5-inch b. s. curb and setting, $1.20 per foot	321 90
1,368	running feet 4-inch b. s. curb and setting, 95 cents per foot	1,299 60
130	running feet 6-inch granite circular curb and setting, $2.05 per foot	266 50
913¼	running feet brick gutter laid flat, 1 ft. wide, 10c.	91 32
8,889	cubic yards grading, at 40 cents per yard	3,555 60
16,428 7/10	cubic yards grading, at 30 cents per yard	4,928 61
25,317 7/10	cubic yards haul, 800 ft. over 200 ft., at 10 cents per yard	2,531 77
8,993	square yards wood pavement laid, at $3.50 per yard	31,475 50
8,300	square yards sodding, at 50 cents per yard	4,150
722	square yards resodded because of fall of sewer banks, 50	361
894¾	lin. ft. Seneca stone steps, $3	2,684 25
395	" " check blocks for steps, $3	1,185
		63,290 02
	Deduct property	5,393 83
		57,896 19
	Certificates	56,078 72
	Amount due	1,817 47

I hereby certify that I have measured and inspected the work done by Robert H. Ryan, on the improvement of New Jersey ave. S. E., from B to E street, in sqr's ——, embraced in his bill dated Sept. 25, 1873, which work was done under the order of the Board of Public Works (contract No. ——, 187–), and find it correct as to quantity and quality, and that the work has been done and material and labor furnished as per contract and specifications.

CHAS. E. BARNEY,
Assistant Engineer.

Dated Sept. 25, 1873.

Approved Sept. 25, 1873.

ADOLF CLUSS,
Engineer B. P. W., in ch'ge.

VI.

The following paper was made, signed by said Ryan, and placed on file among the papers of the District Commissioners, but was not signed by them:

W. B. Nov. 18, 1875. Ent. File 8859 E. O., 1875.

Extension of Contract No. 414.

For and in consideration of the stipulations hereinafter contained, it is agreed by and between the Commissioners of the District of Columbia and Robert H. Ryan that contract No. 414, in the series of contracts made by the Board of Public Works of the District of Columbia, be, and the same is hereby, extended, with its various terms, conditions, and stipulations, to embrace the following work, viz:

Lay and put down the trap-rock pavement on the carriageway of New-Jersey avenue, between D street and the canal, southeast, in accordance with specifications.

10 It is further agreed that the work herein specified shall be completed by the 1st day of Dec., 1875, under penalty of forfeiture of all right and title to perform the same.

It is further agreed that the said Robert H. Ryan shall receive the prices established and paid by the Board of Public Works for work of similar character, provided that payment be made in the bonds issued by the sinking-fund commissioners of the District of Columbia, under and by virtue of section 7 of the act of Congress approved June 20th, 1874, which bonds shall be accepted and received at their par value.

In witness whereof the Commissioners of the District of Columbia, successors to the Board of Public Works, appointed under the act of Congress entitled "An act for the government of the District of Columbia, and for other purposes," approved June 20th, 1875, and the party of the second part to these presents have hereunto set their hands and seals this 18th day of November, 1875.

——— ———, [L. S.]
——— ———, [L. S.]
——— ———, [L. S.]
Commissioners of the District of Columbia.
ROBERT H. RYAN, [SEAL.]
Contractor.

Signed and sealed in the presence of—
WM. A. BROWN.
ARTHUR SHEPHERD.

VII.

Thereafter said Ryan did work for the District, for which the following account was stated by the engineer as thereon appears:

WASHINGTON, D. C., *January* 21, 1876.

District of Columbia to R. H. Ryan, Dr.

3,325.66 square yards new brick pavement laid, at 100 cents per yard	$3,325 66
325 square yards old brick pavement relaid, at 25 cents per yard	81 25
57.90 square yards of new cobble-stone pavement laid, 70 cents per yard	40 53
2,290 running feet 5-inch new b. s. curb and setting, at 120 cents per foot	2,748 00
20.5 running feet 6-inch b. s. curb and setting, at 142 cents per foot	29 11
96.4 running feet 5-inch b. s. curb reset, at 25 cents per foot	24 10
20.5 running feet 6-inch b. s. curb reset at 30 cents per foot	6 15
33.5 running feet 6-inch granite circular curb and setting, 205 cents per foot	68 67
19 running feet 6-inch old granite circular curb reset, 30 cents per foot	5 70
173.7 running feet 16-inch new gutter flag laid, at 48 cents per foot	83 37
6,518.84 cubic yards grading, at 30 cents per yard	1,955 65
2,769.82 cubic yards grading, at 40 " " "	1,107 93
9,288.66 cubic yards haul, 529 ft. over 200 ft., at 06.6125 cents per yard	614 21
7,519.35 square yards Belgian pavement laid, at $3.50 per yard	26,317 72
To removing 20 trees and stumps, at $5.00	100 00
	36,508 05
Deduct for 2 feet grading required under contract, 5,012.9 yds., at 30c	1,503 87
	35,004 18

I hereby certify that I have carefully examined the field-notes and report of Stephen D. Charles, leveler, who measured and inspected this work, and find the quantities correct. The work is reported to be in good condition.

New Jersey avenue southeast, bet. E street canal. Contract 414. January 21st, 1876.

S. H. BODFISH,
Assistant Engineer.

Approved, subject to future inspection of the work.

B. OERTLEY,
Ass't Engineer for Lieut. Engineers U. S. A., and Engineer for D. C.

Jan'y 21, 1876. Final to date.

11 The foregoing account was audited, allowed, and paid through the Board of Audit, as follows:

WASHINGTON, D. C., *Jan.* 24, 1876.

District of Columbia to R. H. Ryan, Dr.

For contract, Ex. 414. Surface N. J. ave. S. E., E to canal:

Final measurement			$36,508 05
Deduct property	$2,171 30		
" cert. 19281 and '2	14,830 68		
" " 19463	12,553 21		
		29,555 19	
			6,952 86
Retain on pavement			166 28
Balance			6,786 58

Contract 414. Sewer N. J. ave. S. E., F to canal:

Final measurement		3,501 98	
Deduct property	$29 25		
" cert. 19463	2,399 91		
		2,429 16	
Balance			1,072 82
Total			7,859 59
Charges:			
File 446, 60 loads sand		15 00	
" 564, sand and gravel 2' st		36 30	
			51 30
Balance			7,808 20

Received this 28th day of January, 1876, from the Board of Audit their certificate, No. 25002, for $7,808.20 in settlement of the above-stated claim.

ROBERT H. RYAN.

VIII.

Said Ryan died April 3, 1881, and said Barnard was duly appointed in the District of Columbia administrator of his estate April 23, 1881.

Conclusion of Law.

Upon the foregoing findings of fact the court decides as conclusion of law that the claimant should be allowed the $166.28 retained as stated in the account set out in Finding VII; that said Ryan was overpaid $1,519.07 upon the account set out in Finding V upon

"haul 800 feet;" that the defendant is entitled to set off so much of said over-payment as equals said sum retained, and that on the whole case the petition must be dismissed.

VI.—*Opinion of the Court.*

RICHARDSON, C. J., delivered the opinion of the court:

Two claims are set out in the petition in this case—

First. The sum of $166.28 "retained on pavement," as appears by the final settlement set out in Finding VII. This is not controverted by the defendant.

Second. The sum of $4,060 for "certain grading of excavation of stone or rock" done by the claimant's intestate, Ryan, over and above the amount paid to him. As to this claim the facts are these: Said Ryan and the Board of Public Works entered into a written contract July 23, 1872, by which he was to do certain work
12 for the improvement of New Jersey avenue southeast, at the prices therein specified, among which were "grading, thirty (30) cents per cubic yard, which shall include the first two hundred (200) feet of hauling," and "excavation and refilling, forty (40) cents per cubic yard, to be measured in excavating only."

Just before the making of this contract the Board had entered in its journal as follows: "Chief engineer was notified that the following price was established for rock excavation, viz, in ditches for sewers, &c., $1.50 per cubic yard; cutting down streets and the like, $1. Auditor and contract clerk notified."

It is urged on the part of the claimant that he is entitled to $1 per cubic yard for so much of the grading and excavation done by said Ryan as was "rock excavation" instead of the contract price of 30 cents for grading and 40 cents for excavation. In this demand we cannot concur.

The entry upon the journal of the Board establishing prices did not control the written contract of the parties subsequently made. It was so held in Rocke's Case (18 C. Cls., 217) where the journal entry establishing prices by its terms related back to a time anterior to the contract. It would seem that entries of that kind in the journal of the Board of Public Works were intended to apply to work where no written contract existed, and perhaps to the kinds of work described where done separately from other work.

The contractor in this case was to be paid 30 cents for grading and 40 cents for excavation, without any distinction as to the different character of the work which might occur in different places. The contract was evidently based upon the average character of the whole work to be done, which might prove either more favorable or more expensive to him than was anticipated. In the one event he would have the advantage, and in the other he would be obliged to sustain the loss.

It is easy to understand that when one was employed to do a piece of work which was all rock excavation he would have a larger price than when employed to do excavation which was of varied

character in different parts, and the prices established by the Board would therefor seem to apply only to work of the former kind.

It appears that in some cases like the present the Board of Public Works did allow and pay contractors the Board rate for rock excavations. There might have exceptional cases of hardship where the Board undertook to favor meritorious contractors beyond their legal rights. But, for whatever reason it was done, no obligation on the District was thereby established to do likewise to other contractors.

Subsequently to the date of Ryan's contract the Board adopted a form of contracts which classified grading and excavating streets into two kinds, road and gravel excavation, and rock excavation when blasting is required. But the claimant is not entitled to the benefits of this change in the form of contracts with subsequently contracting parties, and if he were he would gain nothing by it, for the findings show that none of his rock excavations required blasting.

In Davis's Case, decided at the present term (*ante*—), the claimant had a contract in the more recent form above referred to, in which a price was put down for sand or gravel excavation, and, although rock excavation when blasting is required was put down as one of the items of work, no price was carried out. The claimant did some rock excavation not requiring blasting, and the court held that it did not come within either of the items of his contract. It
13 was not "sand or gravel excavation," and so was not to be paid for at the price named for such work. He therefore recovered for the reasonable value of the work as outside of the contract.

The claimant's case is quite different. The prices fixed by his contract were for grading and excavation generally, and were not limited to sand or gravel excavation. The work he did came within the general language of the contract for which the prices were fixed. Those prices have been paid and nothing more is due on that account.

There are three items of counter-claims set up by the defendant:

First. In the account settled by the Board of Public Works, as set out in Finding IV, the contractor was paid for 8,889 cubic yards of grading at 40 cents per yard, and it is claimed on the part of the defendant that the contract price was only 30 cents a cubic yard.

It is true that the contract does fix the price of grading at 30 cents a cubic yard, but it also fixes the price of excavation at 40 cents a cubic yard. Exactly what was the distinction does not appear, but it seems by the account that the engineer certified to two kinds of grading, one at 30 and the other at 40 cents a yard, and it is to be presumed that the latter included excavation, especially as the findings show that considerable excavation was done. We do not think that the defendant has established any error in the matter.

Second. In the account set out in Finding VII it appears that the engineer deducted $1,503.87 "for 2 feet grading under contract," and that when the account was settled that deduction was omitted and the gross amount was paid. There is nothing in the case by

which to determine whether or not this deduction should have been made, and as the burden of proof is upon the defendant who alleges an error, and it has not been proved, this item of counter-claim cannot be allowed. If the work was done under the original written contract nothing in that instrument required such a deduction on any work embraced in this account. The extension of the written contract signed by the claimant was not signed by the Board of Public Works, and if the work was therefore not done under the written contract we have nothing to show what were the prices agreed upon or what the work was reasonably worth. The defendant has not shown what prices should have been paid, and those actually paid must be presumed to be correct.

Third. In the account set out in Finding IV the claimant's intestate was allowed for "25,317.7 cubic yards, haul 800 feet over 200 feet at 4 cents by yard," which was the contract price and he was paid accordingly.

Subsequently the same account was restated by the Board of Audit and this item was put down down at 10 cents per yard, and the difference between 4 cents and 10 cents was paid thereon. This was wholly without justification and must have occurred by fraud or gross mistake. The claimant was thus overpaid by Board of Audit on that account the sum of $1,519.07. (Neitzey's Case, 17 C. Cls., 101; Brown's Case, 17 C. Cls., 420.

As the original claimant has died, without assets as it is understood, and the case is prosecuted by his administrator, the defendant asks that only so much of said overpayment shall be set off against the $166.28 retained as set out in Finding VII as will equal the latter sum, and that is allowed.

On the whole case the claimant's petition will be dismissed.

14 VII.—*Final Judgment of the Court. April* 20, 1885.

JOB BARNARD, Administrator of Robert H. Ryan, dec'd,
vs.
THE DISTRICT OF COLUMBIA. } No. 127.

At a Court of Claims held in the city of Washington on the 20th day of April, A. D. 1885, judgment was ordered to be entered as follows:

The Court, on due consideration of the premises, find for the defendant, and do order, adjudge, and decree that the petition of the claimant, Job Barnard, administrator Robert H. Ryan, deceased, be dismissed.

15 VIII.—*Application of Claimant for and Allowance of Appeal.*

JOB BARNARD, Administrator of the Estate of Robert H. Ryan, deceased,
vs.
THE DISTRICT OF COLUMBIA. } No. 127.

From the judgment rendered in the above-entitled cause, on the 20th day of April, 1885, in favor of the defendant, the claimant, by

his attorney, I. H. Ford, on the 25th day of May, 1885, makes application for and gives notice of an appeal to the Supreme Court of the United States.

I. H. FORD,
Attorney for Claimant.

Filed May 25, 1885.

And now, to wit, May 25, 1885, it is ordered by the Court that the appeal be allowed as prayed for.

16 In the Court of Claims.

JOB BARNARD, Administrator of Robert H. Ryan, deceased,
versus
THE DISTRICT OF COLUMBIA. } No. 127.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the cause aforesaid, of the findings of fact by the Court and the conclusion of law thereon, of the opinion of the Court, of the final judgment of the Court, of the application of claimant for allowance of appeal to the Supreme Court of the United States and the allowance of same.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims, at Washington city, this 21st day of July, 1885.

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: Court of Claims. No. 272. Job Barnard, administrator of Robert H. Ryan, deceased, appellant, *vs.* The District of Columbia. Filed August 17, 1885.

127-409

Supreme Court U. S.
FILED.
APR 24 1888
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 272.

JOB BARNARD,

ADM'R OF THE ESTATE OF ROBERT H. RYAN,

vs.

THE DISTRICT OF COLUMBIA.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF I. H. FORD, ON BEHALF OF CLAIMANT.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1888.

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

JOB BARNARD, ADMINISTRATOR OF THE ESTATE OF ROBERT H. RYAN,

v.

THE DISTRICT OF COLUMBIA.

No. 272.

Appeal from the Court of Claims.

CLAIMANT'S BRIEF.

The said Robert H. Ryan, on July 23, 1872, entered into a contract with the Board of Public Works of the District of Columbia, being B. P. W. Contract No. 414, to do certain work in the improvement of New Jersey avenue southeast, from B street to the Potomac River.

The work, at some points, involved a large amount of grading and excavation. Included in the 25,317 $\frac{7}{10}$ cubic yards of excavation made by said Ryan, under said contract, prior to September 25, 1873, were 5,800 yards of rock (R., p. 6, Findings III, IV). The written contract is silent as to rock excavation (R., p. 5). For 8,889 cubic yards of said excavation (and refilling) he was paid 40 cents per cubic yard, the contract price in full. For the remaining 16,428 $\frac{7}{10}$ cubic yards—5,800 yards of which were rock ex-

cavation—he was paid only at the rate of 30 cents per cubic yard, the price named in the contract to be paid for *grading* (R., p. 5, top).

The claim is for the difference between the price paid, 30 cents per cubic yard, that being the uniform Board rate for ordinary grading, and $1.00 (the regular Board rate, existing when the contract was made and the work done under it, and the rate actually then paid by the Board for rock excavation) (R., p. 5, Finding II), viz., a difference of 70 cents on 5,800 yards, amounting to $4,060, with interest from September 25, 1873.

Ryan alleged, and has so made oath in his petition, that he had an oral agreement with the Board of Public Works to the effect that, for any work that he might do or material he might supply in the progress of the work under the contract, the prices for which were not named therein, he should receive Board rates (R., p. 1 bottom, 2). It is contended, aside from the oral contract, that for the rock excavation the defendant should pay what it was fairly and reasonably worth.

1. The second item of the claim is for the sum of one hundred and sixty-six dollars and twenty-eight cents ($166.28), the amount of five per cent. to be retained, by contract, for the period of eight months from January 24th, 1876. This retained amount has never been paid, nor is it subject to reduction for repairs to the pavement. It is therefore due with interest from September 25th, 1876 (R., p. 11, 12 top).

This item of the claim is not contested.

That the statutes requiring contracts with the defendant to be in writing, and in pursuance of appropriations were complied with is not controverted. That the work under contract No. 414 was duly completed is not questioned.

The position of the claimant with regard to the $4,060.00

for rock excavation with interest from the date of measurement Sept. 25, 1873 (R., p. 7), is that the debt arises outside of and apart from the written contract.

The right to recover rests upon the separate, cotemporaneous, collateral, oral contract for board rates, which Ryan under oath to his petition (R., p. 1, bottom 2) alleges that he made; or failing in proof of this, the claimant resorts to his rights under the implied contract to pay for the rock excavation what it was reasonably worth, and recover as upon a *quantum meruit*.

"If it is objected that the petition contains no count upon an implied contract for *quantum meruit*, it may be answered, that the forms of pleading in the Court of Claims are not of so strict a character as to preclude the claimant from recovering what is justly due to him upon the facts stated in the petition, although due in a different aspect from that in which his demand is conceived" (Clarke *v.* U. S., 95 U. S. Rep., 543).

2. The claimant thinks the honorable Court of Claims is in error in the construction of the written contract between Ryan and the District of Columbia, No. 414, in that the court makes rock excavation a part of the subject-matter of that contract. The court say at the foot of page 12 of the record: "The contractor in this case was to be paid 30 cents for *grading* and forty cents for excavation (should be, and refilling, R., p. 5), without any distinction as to the different character of the work which might occur in different places." "The contract was evidently based upon the average character of the whole work to be done, which might prove either more favorable or more expensive to him than was anticipated. In the one event he would have the advantage, and in the other he would be obliged to sustain the loss."

In the view of the court as here expressed, Ryan was to make the entire cut, regardless of the quantity of rock encountered, at 30 cents per cubic yard, or refilled, if ever rock is refilled, at 40 cents. We think the court err in construing the *two* prices named in the contract to apply to *three* classes of work, viz., *grading*, excavation and refilling, and rock excavation.

The claimant contends that neither of the parties understood, or intended, that the written contract should touch the subject of rock excavation. But did understand that rock excavation would be paid for, under the distinct oral agreement, in this case, as in others, at $1 per cubic yard, "without reference to the terms of the contract" (R., p. 6, top).

That "rock excavation" was regarded as a distinct class of work to be paid for at a specific and higher price than those named in the written contract plainly appears from the classifications partially given at the foot of page 5 and the top of page 6 of the record; the condition, that "blasting" should be necessary to excavate the rock in order to entitle the contractor to the price of rock excavation, not existing when Ryan's contracts were made (R., 5, bottom). "Said Ryan died April 3, 1881" (R., 11, bottom). He had not previously given his testimony and the evidence of the separate character of the work of excavating the rock as contemplated by the parties to the written contract must be found, if at all, in the manner pointed out by this court in the 21st Howard, 161. The doctrine there announced is that where contracts are fairly made "they must receive a reasonable construction so as to carry their intention into effect, and in general that intention must be gathered from the language employed, the surrounding circumstances, and the subject-matter."

And again in Merriam *v.* The United States (107 U. S.,

441) the court say: "Courts in construing contracts look to the language, the subject-matter, and the circumstances, and avail themselves of the light the parties had when the contract was made in order that they may view the circumstances as the parties viewed them, and so judge of the meaning of words and their application to things described."

Also Jones on Contracts, p. 196–198; Nash *v.* Towne, 5 Wall., 699; Reed *v.* Ins. Co., 95 U. S., 30; Mobile & M. R.R. Co. *v.* Jurey, 111 U. S., 592; Taylor on Ev., sec. 1082.

As to the language of the written contract, the claimant contends that the term *grading* is not applied either in the ordinary or technical use of the word to the removal of rock. *Excavation* is the term invariably used in connection with rock.

The language of the witnesses, clerks, contractors, and engineers through the whole record show this. So do the vouchers. Nowhere does one speak of *grading* rock, or is such a term to be found as rock grading.

And courts take judicial notice of the meaning applied by business men of a community to words representing particular subjects and things.

Fendall's Case, 16th Court Claims, 106.

The distinctive application of the word grading made by the defendant's own officers, and the interpretation contended for by the claimant, is strikingly shown in the quotation from the later form of the contract set out at the top of the sixth page of the record: "*Grading*, for each and every cubic yard of *earth*, *sand*, or *gravel* excavated." Then, specifying a different class of work, the language is, "rock *excavation* in cutting down streets, when blasting, is

required." And the two classes of work are "put down in separate items to be paid for at different prices."

Some of the circumstances worthy of consideration in this connection are to be found in the concluding paragraph of Finding II at the top of the sixth page of the record: "In grading streets the Board, in some cases, did allow, on the certificate of the engineer, $1.00 per square (cubic) yard for rock excavation, even where no blasting was required, without reference to the terms of the contracts. And taken by itself $1.00 a square (cubic) yard was a fair and reasonable compensation for such kind of grading."

It is a reasonable presumption that one undertaking work of the magnitude of that embraced in contract No. 414, requiring for its completion, with extensions, a period of time extending from July 23, 1872, to January 1, 1876 (R., p. 5 bottom, and p. 11 top), had some rational comprehension of the undertaking he was about to enter upon, and some practical knowledge of street improvements; that he had looked over and knew something of the formation through which he was to work; that being a contractor he had knowledge of, and, aside from the oral contract set up, understood that he should receive the same treatment as to rock excavated, as did other contractors. When it is considered that a cubic yard of rock constitutes about three cart loads we find that the construction of the Court of Claims places this contractor in the position of picking and dragging and prying out rock, breaking them with sledges and loading them into carts, while meantime shovel hands and teams are idle because the plows are stopped by the rocks, doing this hard and costly work at *ten cents* a load. And by the same construction he continues to do such work at such price throughout the period extending from July, 1872 (R., p. 3 foot), to September, 1873 (R., p.

6), and to the extent of more than seventeen thousand loads. Under such a ruinous construction, made known at any time during the progress of the work, reason suggests it would have been abandoned and the construction contested.

The interpretation is not according to the ordinary and popular sense of the word "grade." It is not reasonable, nor was it customary. It is harsh and inequitable. In making it the court assuredly lost sight of the equity jurisdiction conferred upon it in the act by which claims of this class were referred to it for settlement (Sup. Revised Statutes U. S., p. 562, top).

II.

There is light thrown upon the intent of the parties to this contract by the subsequent *acts* of the defendant. Those acts amount to the defendant's own interpretation of the contract.

"In general a contract must be construed by the provisions contained in it, and not by anything *dehors;* but still in some cases the court will look at the subsequent *acts* of the parties, although not to subsequent declarations or admissions, either verbal or written, in order to ascertain their intention at the time of making the contract" (Chitty on Contracts, I, p. 126).

This court say: "In cases where the language used by the parties to the contract is indefinite or ambiguous, and hence a doubtful construction, the practical interpretation of the parties themselves is entitled to great, if not controlling, influence" (Chicago *v.* Sheldon, 9 Wall., 50, 54.)

"Where the language of a contract is ambiguous, the practical interpretation of it by the parties is entitled to great, if not controlling, influence."
Topliff *v.* Topliff, 123 U. S., 131.

The third finding of the court, page 6 of the record, is as follows: "In pursuance of his contract, said Ryan performed a large amount of work on New Jersey avenue. Part of the grading done consisted of *excavation of rocks and bowlders* of different sizes, mingled with the earth, but none requiring blasting. *The quantity of such excavation was reported by the Board superintendent of the work at* 5,800 *yards, which estimate came from the engineers.*"

The construction of the Court of Claims is that "The contractor in this case was to be paid 30 cents for grading and 40 cents for excavation" (and refilling), "without any distinction as to the different character of the work which might occur in different places." That this was not the construction of the superintendent and the engineers of the defendant is made plain by the fact that they separate the rock from the ordinary grading in their report, specify particularly the number of yards of rock excavated, and distinguish it particularly from the other two classes of work. This act is consistent only with the theory that the superintendent and the engineers regarded the rock excavated as the subject of separate consideration. And the one and only subject of consideration in connection with it, which naturally suggests itself, is that of the price to be paid for its excavation. If, in the contemplation of the parties, the whole of the matter removed from the cut of the street, earth, sand, gravel, and rock were to be paid for at the same rate of 30 cents a cubic yard, there would be no reason why the engineers should separately measure or estimate the rock, and the superintendent separately report it. In the nature of things, there was a purpose moving these officials thus to separate and classify the work. The natural, the one conceivable object which appears, is that the rock excavation was to be the subject of separate compensation. And the Court of Claims finds that one dollar

a square yard (meaning, of course, a cubic yard) was a fair and reasonable compensation (R., p. 6, top).

Claimant think that the doctrine of the following cases is that which should be applied to this.

Where a contractor has finished his work and it has been inspected and measured so that the fact of quantity and kind is exclusively within the knowledge of the defendants, their proof on the subject must be taken in the form most adverse to themselves.

Ruffee's Case, 15 Ct. Claims, 291, 296.

This case is analogous in one feature to O'Hare's Case (18th Ct. Clms., 681), where, by the terms of the contract, claimant was to be paid only 40 cents a cubic yard for excavation. The contract was silent as to made ground, but the *Board rate* for the excavation of made ground was 50 cents a cubic yard. The court held that the rate of 50 cents per cubic yard was properly paid, and could not be recovered back.

If we waive the oral contract and regard the subject of rock excavation as *casus omissus*, the present claim is sustained by the language of the Court of Claims in Shipman's case.

The third item of the claim in that case was for "lining back of the wall for drainage."

The court say:

"The contract is silent as to the rate of pay for this work, which has been satisfactorily performed. * * * It is plain that this work of gravelling the wall, as contemplated by the contract, was a work of considerable labor and expense; we cannot think that either party intended it to be paid for in computing the masonry. In our opinion it is a *casus omissus*. The parties have accidentally neglected to fix a price for the work. The claimant has done the work. The District has received the

benefit of it, and it only remains for the court to examine the findings and ascertain whether they furnish the means for fixing its value. In finding 24 will be found the final measurement of the work done under this contract certified to by Mr. Bodfish, assistant engineer, and Mr. Oertly, assistant engineer, for the lieutenant engineer. This measurement contains the following item: 4,528 cubic yards of broken stone-filling @ $1.25, $5,660, if allowed. The item was not allowed at the time. The court allows it now as the measure of the amount of such filling, and of its value" (Shipman's Case, 18 Ct. Cl'ms, R. 332.

Again, in the same case:

"Among the items included in this measurement were 1,090.8 perches of dry wall. The contract fixes no price for such labor and material. Lieutenant Hoxie estimates it to be worth $2.50 per perch, and allows that rate. The claimant contends that it is worth more than that, and introduced considerable proof to sustain his contention. We have reached the conclusion that the rate allowed by Lieut. Hoxie is below the prices paid for such wall at the time of its construction, and have found that it was worth $3.50 per perch instead of $2.50, as allowed" (*Id.*, 337).

Where a party engaged to *excavate rock* at a given sum per cubic yard * * * and to do the ordinary excavation at another sum, and in the course of the work a large quantity of *hard pan* was excavated, for which no provision was made in the contract, and the other party conceded that compensation was due beyond the price fixed for ordinary excavation, it was decided that the contractor might maintain a *quantum meruit*. And the stipulation in the contract by which the engineer was to determine all questions necessary to the final adjustment of the contract did not render the engineer's estimate conclusive as to the sum to be paid for *excavating the hard pan*.

Dubois v. *Delaware, &c., Canal Co.*, 12th Wendell, N. Y., 334.

Upon the subject of the interpretation of the statute under which this action is brought, and the right of the claimant to recover upon a *quantum meruit*, the following cases are of interest:

"We believe that the statute (D. C. Claims Act, June 16, 1880, 1 Sup. R. S., 562), is to be interpreted by the principle reiterated by this court in the Caldera cases (15th Ct. Cl'ms, R. 546.), the Dahlgren case (16 *Id.*, 30), and the case of *Braden* v. *Angus* (*Id.*, 389, 411), and that Congress, as the supreme legislative power of the District, speaking for and in the stead of the defendant, agreed to waive the conditions precedent prescribed by the contract, and to consent to an adjudication upon the merits."

Neitzey's Case, 17th Ct. Cl'ms, 123, 126.

Upon the same subject this court has used the following language: "We do not mean to say that where a parol contract has been wholly or partially executed and performed on one side the party performing will not be entitled to recover the fair value of his property or services. On the contrary we think that he will be entitled to recover such value as upon an implied contract for a *quantum meruit*. In the present case the implied contract is such as arises upon a simple bailment for hire; and the obligations of the parties are those which are incidental to such a bailment. The special contract being void, the claimant is thrown back upon the rights which result from the implied contract.

Clarke *v.* U. S., 95 U. S., 539, 542.

Solomon *v.* U. S., 19 Wall., 19.

As to the counter claim, Finding VIII.

The petition was filed Nov. 11, 1880 (R., p. 1). The defendant filed a general traverse Dec. 10, 1880 (R., p. 3). It was not until seventeen months after the claimant's

case was placed on the notice book, until after it was closed, and his request for findings made and brief filed (Docket D. C. cases, No. 127), that this counter claim was filed, to wit, March 19, 1885 (R., p. 3). And then it was presented in such general terms as not fairly to advise the claimant of its character (R., p. 3), which did not appear until the defendant's brief and request for findings were subsquently filed. True, the plaintiff was allowed a short time to file some notes of points in reply, but not to introduce evidence.

That the Court of Claims considered the counter claim is a matter of surprise in view of the rule upon the subject requiring them to be filed within one month after the case is placed upon the notice book (15, p. 9 Rules of the Court of Claims).

The finding is in conflict with the decision in O'Hare's case, where it is held that the defendant, to establish a counter claim of this character, must show that no special circumstances exist for the extra payment.

18th Ct. Clms. R., 648.

This ruling is an eminently proper one, in consideration of the provision of the contract (p. 5 thereof) that: "In the *allowance* for hauling, the length of the haul over two hundred feet, and the amount of material hauled, will be determined on an *average basis* by the chief engineer of the Board of Public Works, whose decision shall be final." That officer, not the contracter, made the measurements (R., p. 5 middle), and made out the accounts (Original R., p. 48). And as the skill and judgment of the engineer are concerned, the actual mistake claimed must be positively shown.

Neitzey's Case, 17th Ct. Clms., 111.

But the defendant adduces no positive evidence upon

the subject. The harsh conclusion of "fraud or gross mistake" is arrived at by a comparison of accounts with one clause of the contract, leaving out of the consideration the clause last quoted, in which a broad discretion is given the engineer. Ordinarily, in cases of fraud, there is some attempt at concealment. Here the engineer certifying the account to the Board of Audit, as it appears in Finding V (R., p. 8), plainly sets down the allowance of ten cents in the face of the contract and the former account. It would seem more natural, in the execution of a purpose by the engineer stating the account, to perpetrate a fraud, that he should, by a remeasurement, have increased the figures either of length of haul or the quantity hauled. And the Board of Audit—unless they, too, were a party to the fraud or mistake—received evidence sufficient to satisfy them of its justice and its propriety, under the clause last quoted, for they passed it and it was paid (R., p. 7, foot). That evidence the claimant had no opportunity, and can have none, to present in this case. Ryan is dead (R., p. 11, foot), and where the engineer, Charles E. Barney, resides the claimant has not been able to learn (Original R., pp. 46, 48). The evidence of the circumstances which justified the additional payment received by Ryan upon the account set forth in Finding V is, therefore, beyond the claimant's reach. But to recover back the $1,519.07, or to set it off against the claim, it is respectfully submitted the defendant should produce some evidence of fraud or mistake, more direct and conclusive—some foundation more substantial upon which to base it—than the inference upon which it is made to rest by the decision of the lower court.

I. H. FORD,
Att'y for Claimant.

Money voluntarily paid, with a full knowledge of all the facts and circumstances under which it was demanded, cannot be recovered back. To recover money so paid the party seeking to recover it must *prove* fraud, duress, or mistake of fact.

Lamborn *v.* Commissioners, 97 U. S., 185; Meech *v.* City of Buffalo, 29 N. Y., 198, 212, 213; Elliott *v.* Swartwont, 10th Peters, 153, 154; Mutual Life Ins. Co. *v.* Wager, 27 Barbour, 344; 2d Greenleaf Ev., sec. 123; Dillon on Corporations, sec. 477; Waite's Actions and Defences, vol. 4. pp. 483, 487; Glass Co. *v.* Boston, 4 Metcalf, 181, 188; Mays *v.* Cincinnati, 1 Ohio State, 268; Awalt *v.* Building Ass'n, 34 Md., 435.

157-409

127-409

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

JOB BARNARD, ADMINISTRATOR OF Robert H. Ryan, deceased, appellant,
vs.
THE DISTRICT OF COLUMBIA.
} No. 272.

BRIEF FOR APPELLEE.

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

JOB BARNARD, ADMINISTRATOR OF Robert H. Ryan, deceased, appellant,
vs.
THE DISTRICT OF COLUMBIA. } No. 272.

BRIEF FOR APPELLEE.

The second item of the claim, $166.28, was not disputed.

The disputed item is stated as follows:

> The sum of $4,060 for "certain grading of excavation of stone or rock" done by the claimant's intestate, Ryan, over and above the amount paid to him. As to this claim the facts are these: Said Ryan and the Board of Public Works entered into a written contract July 23, 1872, by which he was to do certain work for the improvement of New Jersey avenue southeast, at the prices therein specified, among which were "grading, thirty (30) cents per cubic yard, which shall include the first two hundred (200) feet of hauling," and "excavation and refilling, forty (40) cents per cubic yard, to be measured in excavating only.

Appellee relies upon the opinion of the court in support of its judgment upon this claim. The contract for the performance of the work out of which this dispute arose was entered into on July 23, 1872. The material parts of that contract are set forth in Finding I in the record, pages 3, 4, and 5. The price for grading—no reservation, or limitation, or explanation of the work to be done being stated—is specified in that contract. At the time of the execution the following provisions of law relating to all contracts made by the Board of Public Works of the District of Columbia were in force:

> All contracts made by the said Board of Public Works shall be in writing, and shall be signed by the parties making the same, and a copy thereof shall be filed in the office of the secretary of the District; and said Board of Public Works shall have no power to make contracts to bind said District to the payment of any sums of money except in pursuance of appropriation made by law.
>
> Sec. 16. The legislative assembly shall never grant or authorize extra compensation, fee, or allowance to any public officer, agent, servant, *or contractor* after such service has been rendered *or a contract made*, nor authorize the payment of any claim or part thereof hereafter created against the District under any contract or agreement made without express authority of law; *and all such unauthorized agreements or contracts shall be null and void.* (Act of February 21, 1871, ch. 62, sec. 15, 16, Stat. L., 423.)

There was an entry upon the books of the Board of Public Works made June 22, 1872, previously to the contract here considered, as follows:

> Chief engineer was * * * also notified that

the following price was established for rock excavation, viz:

In ditches for sewers, &c., $1.50 per cubic yard.

Cutting down streets and the like, $1 per cubic yard.

Auditor and contract clerk notified.

At some time after the making of said contract the Board adopted a printed form of contracts, in which "Grading, for each and every cubic yard of earth, sand, or gravel excavated," and "rock excavation in cutting down streets, when blasting is required," were put down in separate items to be paid for at different prices.

But this entry was not in any sense a part of the contract between these parties, because it was not a written contract, as required by the organic act of the Board, and because it was varient from and contradictory to the contract between Ryan and the Board of Public Works made during the life of these laws and with full knowledge of their provisions.

The contracts were made in reference to the existing law.

In the latter part of the second finding of the court below is stated: Tr. p. 6.

In grading streets the Board in some cases did allow, on the certificate of the engineer, $1. per square yard for rock excavation, even where no blasting was required, without reference to the terms of the contracts. And *taken by itself* $1. a square yard was a fair and reasonable compensation for such kind of grading.

It will be remarked that the court carefully discriminates between the cases where a price for work had been